

Public Prosecutor v Benzi Anak Nayod (M) & Anor

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HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 41–6–OF
2005–III(11)

DAVID WONG JC

9 FEBRUARY 2006

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*Criminal Procedure — Plea of guilty — Duty of court — Respondents unrepresented —
Whether respondents understand the nature and consequences of their plea*

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The respondents were charged under s 381 of the Penal Code. The respondents were produced before the learned Magistrate on 10th December 2004 and not represented by counsels. They pleaded guilty to the charge. In their plea of mitigation, they all pleaded for non custodial sentences and were each fined RM1,000.00 in default one month imprisonment by the magistrate court. This is an appeal against sentence by the prosecutor where the appellant pointed out that s 381 of the Penal Code mandates a mandatory custodial sentence. There is nothing in the notes of proceedings to show that the respondents understood the consequence of pleading guilty to an offence under s 381 of the Penal Code.

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Held, allowing the appeal, setting aside the conviction and remitting it back to the magistrate court for pleas to be taken again:

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- (1) When a person does not have legal representations in court, the presiding officer must take pains to ensure that person is fully aware of his rights and is further entitled to know the facts and nature of the charge and most importantly the consequence of pleading guilty. One can say that it is his constitutional right. The reason is simple as the plea of guilty itself is a cogent admission of the ingredients of the charge and that person can only make an informed decision as to how to plead only if he had all the relevant information. The irregularities cannot be cured by s 422 of the Criminal Procedure Code (see para 5).
- (2) When the liberty of an individual is at stake, this liberty must be guarded by the court with the utmost care and more so when that individual cannot afford legal representation. Obvious as it may be, this individual's rights are the same as an individual who can afford legal representation. The court's duty is ensure these rights are protected at all times and this can only be done by exercising extra care in discharging his or her judicial duties which means proper research and sound understanding of the law even when it is a simple task of taking a plea of guilty from the accused (see para 10).

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A [Bahasa Malaysia summary]

Responden-responden didakwa di bawah s 381 Kanun Keseksan. Responden-responden di bawa ke hadapan majistret bijaksana pada 10 Disember 2004 dan tidak diwakili oleh peguam. Mereka mengaku bersalah terhadap dakwaan tersebut. Dalam pli meringankan hukuman mereka, mereka kesemuanya memplidkan supaya tidak dipenjarakan dan setiap satu daripada mereka didenda RM1,000.00 atau satu bulan penjara jika gagal membayar denda oleh mahkamah majistret. Ini adalah rayuan terhadap hukuman oleh pendakwa raya, dimana perayu mengatakan bahawa s 381 Kanun Keseksan menetapkan satu hukuman penjara mandatori. Tiada apa-apa dalam nota-nota prosiding yang menunjukkan bahawa responden-responden memahami akibat-akibat mengaku bersalah terhadap satu kesalahan di bawah s 381 Kanun Keseksan.

D Diputuskan, membenarkan rayuan, mengeneipkan sabitan dan menghantar semula kes ke mahkamah majistret untuk akuan diambil sekali lagi:

- (1) Apabila seseorang tidak mempunyai perwakilan undang-undang di mahkamah, pegawai kehakiman mestilah mengambil langkah-langkah untuk memastikan bahawa orang tersebut sedar sepenuhnya hak-haknya dan juga berhak mengetahui fakta-fakta dan sifat pertuduhan dan yang pentingnya akibat-akibat mengaku bersalah. Boleh dikatakan ia hak perlembagaannya. Alasannya mudah oleh kerana akuan salah dengan sendirinya merupakan pengakuan yang jelas terhadap unsur-unsur pertuduhan dan orang tersebut hanya boleh membuat satu keputusan yang berpengetahuan bagaimana ia patut plid hanya sekiranya dia mempunyai kesemua maklumat yang relevan. Luar aturan sebegini tidak boleh diperbetulkan oleh s 422 Kanun Acara Jenayah (lihat perenggan 5).
- (2) Di mana kebebasan seseorang individu menghadapi risiko akan lucut, kebebasan ini mesti dijaga oleh mahkamah dengan penuh ketelitian dan lebih-lebih lagi individu tersebut tidak mampu perwakilan undang-undang. Walaupun ia jelas, hak individu tersebut adalah sama dengan individu yang mampu perwakilan undang-undang. Kewajipan mahkamah ialah untuk memastikan hak-hak ini dilindungi pada setiap masa dan ini hanya boleh dilakukan dengan memberi perhatian yang lebih dalam menjalankan kewajipan kehakiman maksudnya penyelidikan yang sewajarnya dan kefahaman undang-undang yang kukuh walaupun dalam menjalankan tugas yang mudah dalam mengambil akuan daripada tertuduh (lihat perenggan 10).]

Notes

For cases on duty of court, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2454–2469.

I Cases referred to

Meissner v The Queen [1994] 184 CLR 132 (refd)
Philip Lau Chee Heng v PP [1988] 3 MLJ 107 (refd)
Subramaniam & Anor v PP [1976] 1 MLJ 76 (refd)

Legislation referred to

Criminal Procedure Code ss 316, 421, 422
Penal Code s 381

Siti Rafidah bt Zainuddin (Deputy Public Prosecutor, Jabatan Peguam Negara).

Benzi Anak Nayod, Johnli Anak Gunyies, Raspan Bin Kolom (respondents in persons).

David Wong JC:

[1] This is an appeal against sentence. The appellants were charged under s 381 of the Penal code and upon their pleas of guilty to the charge, they were each fined RM1000.00 in default one month imprisonment by the magistrate court.

[2] The facts of this case as recorded by the learned magistrate were that on 4 December 2004 the complainant who is the manager of a factory owned by Synplastik Industries Sdn Bhd arrived at the factory at Jalan Semangat, Kuching and discovered that 14 bags of plastic weighing 420 kgs valued at RM2,730.00 had been stolen. The theft however was recorded by the factory CCTV camera which showed that the respondents were the culprits. A police report was made and on 6 December 2004 a police party went to the factory and arrested the respondents and seized some plastic stolen by the respondents. Investigation concluded that the respondents were responsible for the theft of the plastic bags. The respondents were produced before the learned magistrate on 10 December 2004 and not represented by counsels.

[3] From the notes of proceedings, there appears to be irregularities at pages 3 to 5 of the record of appeal:

From these pages, one can see the following irregularities:

- (1) On 10 December 2004 when the respondents were produced in court, the record showed that the pleas were one of not guilty but this has been treated by me as a typing mistake as the respondents confirmed to me that they all pleaded guilty before the magistrate and that the notes of proceedings on that aspect were incorrect.
- (2) There is nothing in the notes of proceedings to show that the respondents understood the consequence of pleading guilty to an offence under s 381 of the Penal Code. As rightly pointed out by the learned DPP, s 381 of the Penal Code mandates a mandatory custodial sentence. This is so by virtue of the phrase 'shall be punished with imprisonment for a term which may extend to seven years'. In the case of *Philip Lau Chee Heng v PP* [1988] 3 MLJ 107, the court held that the phrase 'shall be punished' as opposed to 'shall be liable' is mandatory and it is given no discretion but to impose a custodial sentence. Nowhere in the notes of proceeding does it show that this was explained to the respondents which explains the fact that in their plea of mitigation, they all pleaded for non custodial sentences.
- (3) The charges were not explained to the respondents separately and neither was the pleas taken separately as required by law (see *Subramanian & Anor v PP* [1976] 1 MLJ 76

- A [4] The issue now is whether or not the above irregularities can be cured. The answer lies in s 422 of the Criminal Procedure Code (CPC) which reads as follows:

Irregularities not to vitiate proceedings

- B Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of:
- (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
- C (b) the want of any sanction; or
- (c) the improper admission or rejection of any evidence, unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

- D [5] The aforesaid irregularities except for the typing oversight in my view cannot be cured by s 422 of the CPC and I say so for the following reasons. When a person does not have legal representations in court, the presiding officer must take pains to ensure that person is fully aware of his rights and is further entitled to know the facts and nature of the charge and most importantly the consequences of pleading guilty.
- E One can say that it is his constitutional right. The reason is simple as the plea of guilty itself is a cogent admission of the ingredients of the charge and that person can only make an informed decision as to how to plead only if he had all the relevant information. In *Meissner v R* [1994] 184 CLR 132, Brennan, Toohey and McHugh J said (at p 141):

- F *A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence.*

- G [6] Closer to home, we have the case of *Chua Ah Gan v PP* [1958] MLJ liv where the appellant was convicted on his plea of guilty. On appeal he argued that the charge was not explained to him properly and as such he did not understand it. Hepworth J found that although it was recorded that the charge had been read and explained, it was not recorded that he understood it. The learned judge stressed that as a matter of practice whether an accused person pleads guilty or not it should always be clear in the record that the charge had been 'read, explained and understood' and that if the plea is one of guilty it should also be made clear in the record that the accused understands the nature and consequences of the plea.
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- I [7] In our present case, the presiding magistrate failed in his duty to ensure that the respondents were aware of the consequence of a guilty plea.

[8] What is my option under such circumstances? The answer lies in s 316 of the Criminal Procedure Act which states as follows:

316. Decision on appeal

At the hearing of the appeal the judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:

- (a) (not applicable);
- (b) in an appeal from a conviction or in an appeal as to sentence
 - (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
 - (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
- (c) in an appeal from any other order, alter or reverse such order.

[9] For reasons stated above, I hold that the accepted pleas of the respondents were bad in law and cannot be accepted. Hence, I set aside the conviction of the respondents and order this case to be remitted back to the magistrate court for pleas to be taken again.

[10] I conclude by saying that when the liberty of an individual is at stake, this liberty must be guarded by the court with the utmost care and more so when that individual cannot afford legal representation. Obvious as it may be, this individual's rights are the same as an individual who can afford legal representation. The court's duty is to ensure these rights are protected at all times and this can only be done by exercising extra care in discharging his or her judicial duties which means proper research and sound understanding of the law even when it is a simple task of taking a plea of guilty from the accused.

Conviction set aside and case remitted back to magistrate court.

Reported by Sally Kee

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